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JRI RESOURCES SDN BHD

v.

VARIA TENGGARA SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 22NCC-1473-09-2011]
29 JANUARY 2013

C ***CONTRACT:*** *Frustration - Impossibility - Whether pleaded specifically - Test of - Whether there was supervening event - Whether circumstances rendered performance radically different from that which was undertaken by contract - Extension of time - Whether plaintiff entitled to payment for extended period*

D On 20 April 2007, Lembaga Pelabuhan Kuantan awarded the defendant a contract to salvage the wreck of a vessel known as MV Rico which had sunk off the coast of Kuantan. The defendant appointed New Pusan Underwater Development Co as its
E subcontractor to salvage and dispose of the wreck. The defendant also appointed See Song & Sons Sdn Bhd, the owners of a barge known as "Meisun G7", to remove the clinker in MV Rico. The plaintiff was to come in and remove the "carcass" after the said clinker had been removed. The defendant paid the plaintiff the sum
F of RM1,529,100 for charter days together with the costs of mobilisation and demobilisation. Unfortunately, on 30 October 2007, Meisun G7 accidentally collided into MV Rico resulting in itself sinking next to MV Rico. The clinker that was supposed to be removed remained. On 25 August 2008, MMS Gagah arrived
G at the Kuantan Port and a notice of readiness to work was issued. It was the plaintiff's contention that the charter period commenced from 2 August 2008 to 1 September 2008 and the hire period was subsequently extended for a further five days 17 hours, with effect from 2 September 2008 to 7 September 2008,
H including the mobilisation and redelivery of MMS Gagah to Pasir Gudang in Johor Bahru. The plaintiff claimed for the sum of RM863,591.86 together with interests for that extended period of hire. The defendant denied the plaintiff's claim that the charter hire was extended and subsequently counterclaimed for a refund of the sum paid under the original period of hire. It was the defendant's
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contention that the charter party agreement had been frustrated where a supervening event, the collision and subsequent sinking of Meisun G7 before MV Rico could be cut and lifted by the plaintiff, had rendered the performance of that contract to cut and lift MV Rico, impossible. The issues, that arose for consideration were, *inter alia*: (i) whether the plaintiff was entitled to payment for the extended period pursuant to the provisions of the charter party agreement; and (ii) whether the defendant was entitled to the counterclaim for reasons that the charter party agreement had been frustrated.

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

(1) The defendant had demarcated its pleas and there was nothing to relate the events of frustration pleaded as the basis for the counterclaim as the defence to the plaintiff's claim. From the defence, the defendant had kept the two events quite separate. Thus, the plea of the defence was deficient, lacking in details or particulars. The plea of frustration as a defence, therefore, could not be considered. (paras 23 & 24)

(2) The event of collision by a third party was clearly contemplated, anticipated or envisaged by the parties as evidenced by cls. 2, 8, 9 and 11 of the charter party. The defendant was responsible for the appointment of See Song & Sons Sdn Bhd and the collision was caused by Meisun G7's negligence. (paras 36-39)

(3) The collision by Meisun G7 was not one that would render the contract agreed between the parties as radically different from that which was undertaken by the contract. The plaintiff could not have begun operations but for the instructions of the defendant. As such, it could not be said that the parties would be performing a contract that was radically different from that which was originally envisaged. It was not practically unjust to enforce the original promise under the charter party. (paras 40-45)

(4) There are three elements woven into the fabric of the doctrine embodied in s. 57 of the Contracts Act 1950, *ie*, (i) the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been

made in the contract; (ii) the event relied upon by the promisor must be one for which he or she is not responsible; and (iii) the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. Since the said three elements were not present on the facts, s. 57 of the Contracts Act 1950 did not bite. (para 32)

(5) In relation to the plaintiff's claim for the unpaid sums arising from the extension, the evidence was clear that the defendant had made such a request. The extension sought by the defendant was initially for one month, which was shortened to five days. The rate for the extension, mode and place of payment for such extended hire were provided in the charter party. (paras 52-54)

Case(s) referred to:

Davis Contractors Ltd v. Fareham Urban District Council [1956] AC 696 ***(refd)***

Dato' Yap Peng v. Public Bank Bhd & Ors [1997] 4 CLJ 115 CA ***(refd)***

Foo Song Mee v. Ho Kiau Seng [2011] SGCA 45 ***(refd)***

Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd [2007] 3 CLJ 695 CA ***(refd)***

J Lauritzen AS v. Wijsmuller BV [1990] 1 Lloyd's Rep 1 ***(refd)***

Kin Nam Development Sdn Bhd v. Khau Daw Yau [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 FC ***(refd)***

Loy Chin Assoc Pte Ltd v. Autohouse Trading Pte Ltd [1991] 3 CLJ 1954; [1991] 4 CLJ (Rep) 974 HC ***(refd)***

Ocean Tramp Tankers Corp v. V/O Sovfracht [1964] 1 All ER 161 ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 57(1), (2)

For the plaintiff - Pradeep Kumar Nandrajog (Khairul Bariah Kharudin with him); M/s Syarikat KL Rekhraj

For the defendant - Peter Yap; M/s Kevin & Co

Reported by Kok Fie See

JUDGMENT

Mary Lim J:

Background Facts

[1] On 20 April 2007, Lembaga Pelabuhan Kuantan awarded the defendant a contract to salvage the wreck of a vessel known as MV Rico which had sunk off the coast of Kuantan. The defendant appointed New Pusan Underwater Development Co as its subcontractor to salvage and dispose of the wreck.

[2] But, first, the clinker in the MV Rico had to be removed. The defendant appointed See Song & Sons Sdn Bhd, the owners of a barge known as "Meisun G7" for that. The plaintiff was to come in and remove the "carcass" after that clinker had been removed. The defendant paid the plaintiff the sum of RM1,529,100 for charter days together with the cost of mobilisation and demobilisation.

[3] Unfortunately, on 30 October 2007, the Meisun G7 accidentally collided into the MV Rico resulting in itself sinking next to the MV Rico. The clinker that was supposed to be removed remained. The defendant referred to this as the "first abortive attempt".

[4] On 25 August 2008, MMS Gagah arrived at the Kuantan Port and a notice of readiness to work was issued. According to the plaintiff, the charter period commenced from 2 August 2008 to 1 September 2008. The plaintiff claimed that the hire period was subsequently extended for a further five days 17 hours with effect from 2 September 2008 to 7 September 2008 including the mobilisation and redelivery of MMS Gagah to Pasir Gudang in Johor Bahru. The plaintiff's claim for the sum of RM863,591.86 together with interest is for that five day extended period of hire.

[5] In denying the claim, the defendant relies mainly on the plea of frustration. The defendant further counterclaimed seeking for a refund of the sum paid under the original period of hire. Specifically, the defendant denied that the charter hire was extended.

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Findings

[6] The parties had agreed on the following two issues:

(i) Whether the plaintiff is entitled to the payment for the extended period pursuant to the provisions of the charter party agreement?; and

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(ii) Whether the defendant is entitled to their counterclaim for reasons that the charter party agreement has been frustrated?

C **[7]** The determination of these two issues requires the question of whether the frustration applies in the facts and circumstances of this case to be answered first. This is how the defendant has pitched the defence of frustration.

D **[8]** Mr Peter Yap, learned counsel for the defendant submitted that there were two attempts to "cut and lift" the MV Rico. Both attempts were "abortive". The "first abortive attempt" took place when the Meisun G7 collided into the MV Rico and sank on 30 October 2007. When that happened, the plaintiff could not carry out the cutting and lifting of MV Rico. The intended works were then abandoned. Hence, described as the "first abortive attempt".

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[9] Then, the second attempt. This was about nine months after the first abortive attempt. On or about 25 August 2008, the MMS Gagah arrived at Kuantan Port and a notice of readiness was issued. The defendant alleged that from this date, the plaintiff "unilaterally commenced charging the defendant ... at the rate of USD50,000 per day under the 2007 contract ...".

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G **[10]** Learned counsel went on to submit that "on 2 September 2008, the plaintiff issued a notice of redelivery of MMS Gagah to the defendant that indicated that the plaintiff was proceeding with demobilisation". The plaintiff proceeded to demobilise on 6 September 2008 and arrived back at Pasir Gudang on 7 September 2008. The plaintiff's claim is "based from 2 September 2008 to 7 September 2008 (a total of five days and 17 hours) at the rate of S$50,000 per day".

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[11] The defendant alleged that throughout the entire period from 25 August 2008 to 7 September 2008, this "second abortive attempt", the plaintiff did not do any cutting or lifting works for the MV Rico, the very work which the plaintiff was engaged for.

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The reason for this inability to carry out the works was again due to the presence of the unremoved clinker; the same reason for the first abortive attempt.

[12] Learned counsel submitted that the plaintiff knew or ought to have known of the presence of the unremoved clinker which caused the plaintiff's inability to perform the services for which it was engaged by the defendant to do in the first place. This was because the plaintiff had received what is known as the "Neo Marine Report" from the defendant sometime in May 2008. The plaintiff is said to have had "ample opportunity to verify and ascertain the feasibility of the works prior to mobilisation, but failed to do so".

[13] It was therefore the submission of the defendant that "as regards the first abortive attempt, the contract was frustrated when subsequent to its formation; there was a change of circumstances that rendered the contract physically impossible to be performed. This occurred when Meisun G7 collided with MV Rico which resulted in the sinking of the Meisun G7, and this resulted in the presence of the clinker that remained unremoved in MV Rico and that created a situation whereby the purpose and object for the engagement of the plaintiff's MMS Gagah was rendered impossible to perform." Specifically, learned counsel submitted that:

> The facts and circumstances relating to, and subsequent to, the 2nd abortive attempt, cannot amount to an extension or revival of the 2007 Contract, because:
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> (a) the circumstances relating to the cutting and lifting of the MV Rico were radically different in August of 2008, as compared to the circumstances when the 2007 Contract was made;
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> (b) there was no *consensus ad idem* between the parties as to the material terms of the purported extension of the 2007 Contract, in the events of August 2008, leading to the mobilization and demobilization of MMS Gagah;
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> (c) there can be no extension or revival of a contract when the terms or conditions of the 'renewed' contract (even if there was *consensus ad idem*) are materially different from the original contract;

A (d) the conduct of the parties themselves, amounted to a substantial deviation of the terms of the 2007 Contract; and

(e) if the Plaintiffs maintain that the 2007 Contract was merely postponed, then it is incumbent on the Plaintiff to satisfy the Court, that the terms of the 2007 Contract remained intact without any deviation or variation.

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[14] With respect, I must disagree with the defendant. While the general principles and thereby the submission on the law of doctrine of frustration is generally correct, in answer to the C question that was posed at outset, there is actually, no place for its application in the facts and circumstances of this case. On the contrary, after examining the pleadings and the documents tendered, the oral testimonies of the witnesses; and the oral and written submissions of both learned counsel, I am satisfied that the D plaintiff has proved its claim on a balance of probabilities. This finding and my reasons for the finding directly impact on the counterclaim which I find not proved. The counterclaim will therefore be dismissed.

E **[15]** The place to start must be the underlying contract between the parties. There was some initial apprehension on whether this charter party or 2007 contract was a Supplytime 89 contract. In the statement of claim, the plaintiff had referred to this contract as the "Supplytime 89" contract. As such, the defendant had F pleaded that Supplytime 89 applied to the 2007 contract. The defendant is quite happy with it being a Supplytime 89 contract as it would contain an express *force majeure* clause. Actually, this 'disparity' does not make any difference to the defendant as it has pleaded the alternative defence of frustration; and it does not need G to rely on the express terms of *force majeure*.

[16] As it turned out, the 2007 contract is not a Supplytime 89 contract. The relevant charter party is found at p. 2 of bundle A. There is no reference anywhere in this charter party that it is a Supplytime 89 charter party as compared to the charter party for H MMS Panglima which was to support the MMS Gagah - see p. 7 of bundle A1 (Box 18: Towing and as standby vessel to MMS Gagah. Charter of vessel always within the safe parameters of the vessel and crew). Mr Pradeep Kumar Nandrajog, learned counsel for the plaintiff conceded that the charter party or 2007 I contract is not a Supplytime 89 contract.

[17] In my view, nothing turns on this as the issue is really about the application or otherwise of the doctrine of frustration here. The pleadings are sufficient to clarify the position. In any case, the defendant is not claiming that it was misled or prejudiced by this plea.

[18] Moving on to the substantive issue of frustration. And, this is where I have difficulty with the defendant's arguments. Bearing in mind that it is intended to be a defence to the plaintiff's claim for the period of extension, it must be so pleaded. Having scrutinised the defence extremely carefully, I find that this plea is in fact not raised.

[19] This is how the defendant has responded to the claim relating to the extended charter hire. Apart from denying that there was any agreement on the extension (see paras. 8 and 9 of the defence), the defendant pleaded at para. 10 as follows:

> 10. The Defendant makes no admission as to the works purportedly done by the Plaintiff for 5 days and 17 hours starting from 2/9/2008 till 7/9/2008 and puts the Plaintiff to strict proof thereof. Even if the Plaintiff had done any such work as claimed, the Defendant denies any liability to the Plaintiff on grounds, *inter alia*, that the Plaintiff's purported works were unwarranted and/or incapable of performance under circumstances whereby the Plaintiff knew or ought to have known. The Defendant will, at the trial of this action examine the Plaintiff as to the true nature and actual circumstances of the purported works upon which the Plaintiff's unjustified claim is based.

[20] The defendant then proceeded to plead:

> 11. As regards paragraph 10, 11 and 12 of the SOC, the Defendant stated that the Defendant is not liable to the Plaintiff in the circumstances aforesaid.
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> 12. As regards to paragraph 13 and 14 of the SOC, the Defendant denies that the Defendant is liable to the Plaintiff in the alleged demand for the aforesaid reasons.
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> 13. In the circumstances, the Plaintiff's claim under paragraph 15 of the SOC is denied.
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> 14. Save as herein before, specifically admitted the Defendant denies each and every allegation contained in the amended Statement of Claim as if the same was set forth *seriatim* and specifically traversed.

[21] It is only at para. 15 onwards that the matters relating to the plea of frustration are made and then, only for the purpose of the defendant's counterclaim. At para. 22 that the defendant stated:

> 22. In the circumstances, the Defendant repeats paragraphs 2-21 above and states that the Plaintiff is not entitled to retain the said payment of RM1,529,100.00 which the Plaintiff had admitted having received under paragraph 6 of the SOC. The Defendant hereby counterclaims the Plaintiff for repayment of this amount.

[22] The Federal Court in *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430, 439 had occasion to deal with this specific question of a plea on frustration; and "whether the Court of Appeal was right in invoking a principle of law which was never pleaded or argued at the court below or even before it as a ground for arriving at its decision". It held:

> [19] It is trite that in pleading frustration, particulars which give rise to frustration must be pleaded specifically in the pleadings. The parties in this case had not pleaded or submitted that the contract in question had been frustrated. Thus, the defendants were highly prejudiced when the Court of Appeal decided on the issue of frustration.

[23] The defendant has clearly demarcated its pleas and there is nothing to relate the events of frustration pleaded as the basis for the counterclaim as the defence to the plaintiff's claim. From the defence, it may even be said that the defendant had kept the two events quite separate. For the extension, there was no extension. For the counterclaim, the plea of frustration is raised as a basis for the claim. The defendant may well have intended the plea of frustration as a defence. But, that is not how it is pleaded. It is not the function of the court to improve on any party's pleadings; or to read what is clearly not there.

[24] Thus, the plea at para. 10 of the defence is deficient, lacking in details or particulars which was referred to by the Federal Court in *Pacific Forest Industries Sdn Bhd & Anor*. The plea of frustration as a defence therefore, cannot be considered.

[25] In any event, the elements necessary to establish the principle of frustration are not satisfied here. The law relating to frustration is codified in s. 57 of the Contracts Act 1950 which reads as follow:

> Agreement to do an impossible act
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> 57. (1) An agreement to do an act impossible in itself is void.
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> Contract to do act afterwards becoming impossible or unlawful
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> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
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> Compensation for loss through non-performance of act known to be impossible or unlawful
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> (3) Where one person had promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

[26] It is apparent that the defendant is not referring to s. 57(1). The act which the plaintiff was contracted to do, which is to cut and lift the MV Rico, is not impossible in itself. What the defendant is relying on is s. 57(2), that is, where a supervening event had rendered the performance of that contract to cut and lift the MV Rico, impossible.

[27] The defendant submitted that the 2007 contract or charter party was frustrated because after it was made, "the circumstances relating to the cutting and lifting of the MV Rico were radically different in August of 2008, as compared to the circumstances when the 2007 contract was made". By this, counsel was referring to the sinking of the Meisun G7; an event that the defendant argued it played no part and which was "totally unexpected". This rendered the 2007 contract impossible to perform as it interrupted the clinker removal works ..., leaving ... the clinker unremoved which rendered the cutting and lifting works ... impossible to perform. The defendant was therefore discharged from its obligations and the monies paid must be returned.

[28] With respect, that is not all to the doctrine of frustration. On my part, I am reminded that the doctrine of frustration was "evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises ... The object of the doctrine was to give effect to the demands of justice, to achieve a just and equitable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after significant change in circumstances." More significantly, as cautioned by the Court of Appeal in *J Lauritzen AS v. Wijsmuller BV* [1990] 1 Lloyd's Rep 1, 8, the "doctrine is not to be lightly invoked" and it "must be kept within very narrow limits and ought not to be extended" as "the effect of frustration is to kill the contract and discharge the parties from further liability under it".

[29] So, where are the limits in the first place? The test on determining whether a contract has been frustrated by a supervening event was laid down by Lord Radcliffe in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696 and cited by the English Court of Appeal in *J Lauritzen AS v. Wijsmuller BV* [1990] 1 Lloyd's Rep 1, 8 - the two cases relied on by the defendant. Lord Radcliffe's *dicta* was in fact cited with approval by our Court of Appeal in *Dato' Yap Peng v. Public Bank Bhd & Ors* [1997] 4 CLJ 115, 125; [1997] 3 MLJ 484, 493:

> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

[30] I find Lord Reid's description of frustration in *Davis Contractors Ltd* and cited by Bingham LJ in *J Lauritzen AS v. Wijsmuller BV (supra)* even more clear:

> ... there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it, the question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.

[31] Learned counsel for the defendant's argument is that the collision and subsequent sinking of Meisun G7 before the MV Rico could be cut and lifted by the plaintiff was a supervening event or 'new situation' which was 'unforeseen' or 'unexpected' or 'uncontemplated'. But, as explained by Lord Denning MR in *Ocean Tramp Tankers Corp v. V/O Sovfracht* [1964] 1 All ER 161 and again cited with approval by the Court of Appeal in *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695, 703, the doctrine of frustration "... has frequently been said ... applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature". The English Court of Appeal in *Ocean Tramp Tankers Corp v. V/O Sovfracht* was of the view that:

> But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it.
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> But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated. ... So the doctrine may still apply, if it be a proper case for it.
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> We are thus left with a simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract'... To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern.
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> There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about frustration. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law ...

[32] Similarly, after examining the above English Court of Appeal's decision and its own earlier decision in *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 where Lord Denning MR's same *dictum* was applied, the Court of Appeal here concluded that:

> It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s. 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s. 57 does not bite.

[33] The Federal Court's earlier decision in *Kin Nam Development Sdn Bhd v. Khau Daw Yau* [1984] 1 CLJ 347; [1984] 1 CLJ (Rep) 181 endorses this position. Now, in examining whether the three elements are fulfilled here, it is important to appreciate what the MMS Gagah was chartered for in the first place. The charter party is found at p. 2 of bundle A. It is captioned:

> UNIFORM CHARTER PARTY FOR CRANE BARGE 'MMS GAGAH' LIFTING SERVICES

[34] At Box 18, the employment of the MMS Gagah, known also as "the crane" was restricted to:

> LIFTING OF WRECK 'MV RICO', SUBJECT TO THE FOLLOWING CONDITION:
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> 1. GOOD WEATHER
> 2. SEA CONDITION SHALL NOT BE EXCEEDING 1.5 METERS HEIGHT
> 3. WINDSPELL SHALL NOT MORE THAN 10 KNOTS
> 4. CEMENT CARGO CLEARED FROM THE WRECK
> 5. LOAD AT ALL TIME NOT MORE THAN 500 METRIC TONNE

[35] Hence, it would appear that the MMS Gagah was to lift the MV Rico after the cement cargo had been cleared from the wreck. The date of operation of the MMS Gagah was "TBA" (to be advised). The port or place of delivery as well as the area of operation of the MMS Gagah was at the 'Kuantan Port'. The MMS Gagah needed to be mobilised from Pasir Gudang. As for the period of hire, it was for a minimum period of seven days (Box 9) and the hire was paid in advance as a lump sum - see Boxes 21 and 22 of the charter party. Aside from these terms, the "standard terms and conditions" found at pp. 4 to 7 of bundle A apply.

[36] As seen from the standard terms and conditions, the parties had agreed and provided for numerous matters in relation to the "hire of the crane". For example, the parties had provided for the event of delay (cl. 11); cancellation (cl. 12); termination (cl. 14). The parties had also agreed to the plaintiff's use of the defendant's equipment. At cl. 5(d), the defendant agreed "to permit JRI to use client's equipment, tools and materials as far as available at site, if required, during and for the purpose of operating the crane under this agreement, free of cost". I point this out as there was some issue about the plaintiff not having available all equipment for the job. This clause shows that the parties had already anticipated and provided for this.

[37] More significantly and for the purpose of the dispute at hand, the parties had agreed at cls. 2, 8, 9 and 11 of the charter party on the question of risk:

> 2. In consideration of the hire of the Crane, The CLIENTS shall pay to JRI the PRICE stipulated overpage ("the Price"). **In addition, CLIENTS shall pay and/or indemnify JRI at cost plus ... for any and all expenses incurred by JRI including** but not limited to ...
>
> **The CLIENTS shall also pay and/or reimburse JRI for any unforeseen expenses including but not limited** to equipment, material, services and personnel, etc. which may be considered necessary by JRI from time to time. If substantial amounts are at stake, such expenses to be agreed with the CLIENTS' representative first. These expenses will be charged at cost plus ...

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8. Without prejudice to any provision herein, *CLIENTS hereby acknowledge and agree that JRI shall not be liable for any losses or damaged suffered by CLIENTS or any other party, their servants or agents, directly or indirectly, contractually or otherwise having a relationship with CLIENTS and of which relationship JRI's Crane was hired, however arising out of or in connection with the operation or attempted operation of the Crane under this Agreement or any part thereof.*

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9. Notwithstanding any special or general provisions otherwise applying to this Agreement, *CLIENT warrants, that it will hold harmless and indemnify JRI from, and against any and all actions, costs, claims of defending same of whatsoever nature and howsoever arising out of or in connection with JRI's operations or attempted operation of the Crane under this Agreement or any thereof and whether or not due to any negligence of JRI or otherwise, but always including*:

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(a) all or any liability arising out of or resultant upon the personal set or omission of JRI committed with the intent to cause such liability, or recklessly and with knowledge that such liability would probably result.

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(b) damage done to vessels or property of third parties through collision with the vessel(s), provided always that JRI's liability hereunder shall not exceed the limits of liability according to the International Conventions and/or local law.

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(c) claims for personal injury or death of JRI personnel.

11. In the event that JRI is being delayed or prevented from performing the Scope of Work referred to over page due to any reason beyond the control of JRI (including weather delay), CLIENTS shall pay JRI an additional amount equivalent to the demurrage rate set forth over page per day or pro rate for the time JRI is delayed or prevented from commencing or continuing the Scope of Works intended with the customary progress. JRI shall be advised about all delays, if possible, in advance. In this respect, CLIENTS acknowledge and agree that the demurrage rate are genuine per estimate of the damages suffered or to be suffered by JRI and not a penalty on CLIENTS. (emphasis added)

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[38] The plaintiff had further argued that the defendant was responsible for the appointment of See Song & Sons Sdn Bhd, the owners of Meisun G7. This was said to have been confirmed by the testimony of Encik Farudee bin Mohd @ Nurjab (DW1),

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the defendant's witness. DW1 was the defendant's project manager. Since See Song & Sons were the defendant's contractors and the collision was caused by Meisun G7's negligence, it was urged upon the court to find that the frustration was self-induced. I agree. See Song & Sons Sdn Bhd are not strangers to the defendant. Neither are they parties over whom the defendant had no control whatsoever.

[39] I therefore agree with the plaintiff that the first two elements postulated by the Court of Appeal in *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695, 703, are not satisfied here. In my view, the event of collision by a third party was clearly contemplated, anticipated or envisaged by the parties as evidenced by these several clauses. Because the defence of frustration is intended to "mitigate the rigour of the common law's insistence on literal performance of absolute promises" and "... to give effect to the demands of justice, to achieve a just and equitable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after significant change in circumstances", I am not inclined to invoke the doctrine "lightly". Instead, I am inclined to keep it "within very narrow limits". I also agree that the Meisun G7 was within the responsibility of the defendant such that the defendant cannot satisfy the second element.

[40] As for the third element, I do not find the collision by the Meisun G7 one that would render the contract agreed between the parties "radically different from that which was undertaken by the contract." The 2007 contract provided that the date of operation of the MMS Gagah was to be advised. The operation being to lift the wreck of MV Rico subject to several limitations as set out in Box 18. All that the collision by Meisun G7 has done to the circumstances is delay the "date to be advised" and the performance by the plaintiff in respect of the lifting of the MV Rico. However, this does not discharge the defendant from paying the plaintiff as the parties have clearly provided for such an eventuality: see for example Box 11 (period of hire: minimum seven days firm); Box 6 (cancelling date: not applicable); and cls. 2, 8, 9 and 11 of the 2007 contract.

[41] According to Encik Abdullah Sani (PW1), the Barge Master of the MMS Gagah at the material time, the MMS Gagah was hired on a daily charter to carry out the lifting of the wreck of MV Rico under the instructions of the defendant. PW1 was the person who liaised with the defendant; he wrote the relevant letters and attended the critical meetings where the issue of mobilisation of the MMS Gagah was frequently discussed by the port authority and the parties involved. He informed the court how the dates for mobilisation were changed several times for various reasons and this is evident from the minutes of the meetings tendered in court. PW1 further informed the court in no uncertain terms that the MMS Gagah was "just to lift the wreck to remove". He also confirmed that the vessel was "anchored at the site of Kuantan Port during the period from 27 August 2008 to 7 September 2008". His evidence is borne out by the records as found at p. 70 of bundle A.

[42] PW1 also testified that the MMS Gagah did not lift the MV Rico because after a visual diving survey had been conducted, it was found that the defendant was not ready to do so. He said that the defendant was not ready to do so "from 27 August 2008 onwards". He was then instructed by Encik Sulhizzan bin Ishak (PW2) to "sign off on 6 September 2008" and the MMS Gagah was then demobilised on 7 September 2008 to Pasir Gudang from Kuantan Port.

[43] PW2 was the executive director of the plaintiff. He was in charge of the hire. His evidence is also consistent with the terms found in the charter party. He informed the court that the plaintiff did a diving visual survey from 8 to 9 November 2008 prior to mobilisation and entry to work site in order "to ascertain the readiness for lifting of MV Rico". According to PW2, mobilisation finally took place on 21 August 2008 (see notes of proceedings at p. 30). The plaintiff wanted to demobilise the MMS Gagah when the charter party ended on 1 September 2008; but the defendant did not agree. According to PW2, "instead, the defendant arranged for a meeting for the extension and renewal of the charter of MMS Gagah" (see p. 83 of bundle A1 - p. 31 notes of proceedings). His evidence is also supported by the deck log records of the MMS Gagah and MMS Panglima for the period of 21 August 2008 to 25 August 2008. The records show the delivery of MMS Gagah at Kuantan Port until the notice of readiness to start work.

[44] The evidence therefore show that after a series of meetings which involved the Port Authority, the defendant did inform the plaintiff that MMS Gagah was to be mobilised on 15 August 2008 and lifting works were to start on 20 August 2008 because 90% of the clinker work had been completed. In the minutes of such a meeting at p. 76 of bundle A, the meeting was advised by the defendant that "MMS Gagah akan bertolak dari Pasir Gudang pada 15 Ogos 2008 dan dijangka bersedia untuk membuat kerja lifting pada 30 Ogos 2008". These dates were subsequently changed to 21 August 2008 and 25 August 2008 respectively as evident from the defendant's own email written by DW1 to the plaintiff on 18 August 2008 (see p. 21 of bundle A1):

> Dear Ir. Zul,
>
> Please take note for the mobilization MMS Gagah and MMS Panglima to Kuantan Port is 25 August 2008. This change due to bad weather.
>
> From 31 August 2008 to 10 August 2008 weather are very bad, all my divers cannot do diving actually. So the progress are 0%. Now since 12 August 2008 weather are good again all my diver work hard to catch up the progress.
>
> Your cooperate are much appreciate.

[45] The plaintiff could not have begun operations but for the instructions of the defendant. Given these circumstances, it cannot be said that the parties would be performing a contract that is radically different from that originally envisaged. The court does not find it practically unjust to enforce the original promise under the 2007 contract. Since the three elements are not present on the facts, s. 57 "does not bite."

[46] I must also deal with this matter of the Neo Marine Report. The point made by the defendant is that this report was given to the plaintiff sometime in May 2008. It contained a calculation of the volume of clinker still present in the MV Rico and which had not been removed. This report was said to enable the plaintiff to study the feasibility and method of operation for the cutting and lifting of the MV Rico. The argument that the defendant makes is that the plaintiff was supposed to verify the contents of the report before it mobilised and issued the notice of readiness. Since the plaintiff had failed to do so, then it is at fault and the defendant should not be expected to pay.

[47] I further want to deal with the defendant's suggestion that for the five days or extended period of hire, the terms of hire had changed. While originally, the plaintiff was hired for its crane services, by the time the extended period came round, the parties had revisited their basic terms of engagement. This time round, the parties had agreed that the plaintiff was to remove the clinker from the MV Rico before cutting and lifting it in several pieces or cuts.

[48] With respect, both these propositions must be rejected. Apart from a lack of plea, that was not the evidence even of the defendant's own witness. PW2 had also disagreed that the plaintiff was contracted to salvage the MV Rico in the manner described by the defendant. As far as the plaintiff was concerned, the agreement was for a charter hire to lift the MV Rico with each piece of the wreck not to exceed 500 metric tons.

[49] As for the pleaded defence, it merely raised the matters related to the collision. It pleaded that the plaintiff was not able to carry out its work by reason of that collision; and that the "plaintiff knew or ought to have known that the presence of the unremoved clinker had rendered the purpose and the object of the agreement for which the plaintiff's services were engaged and/or employed incapable of performance" - see para. 19. The alleged change in the terms of hire is not pleaded and therefore must be disregarded.

[50] As for the reports, it is again, irrelevant. There were, in fact, two other diving reports. All these reports show that the clinker still had not been removed. But, this is neither here nor there, as the removal of the clinker is not within the scope of employment of the MMS Gagah as is evident from the 2007 contract which we have seen earlier. Knowing the state or condition of the MV Rico in no way amounts to any agreement, by any degree, to remove the clinker from its hold.

[51] Further, I observed that nowhere in the correspondence exchanged between the parties at the relevant time, did the defendant allude to any frustrating event. Neither, did it dispute the plaintiff's retention of the sum already paid. When the defendant failed to pay upfront for the extension and when "there was no positive development taken to address" the removal of the

MV Rico the plaintiff demobilised as it was entitled to under the terms of the charter party - see the plaintiff's letters dated 4 September 2008 and 5 September 2008 at pp. 105 and 106 of bundle A and cl. 14 of the 2007 contract. These pieces of contemporaneous evidence indicate this plea of frustration is really more in the nature of an afterthought. Therefore, the defendant's arguments are without merit and must be rejected. With this, the counterclaim and the defence (if at all, the plea of frustration is relevant), must fail.

[52] Returning then to the plaintiff's claim for the unpaid sums arising from the extension. The evidence is clear that the defendant had made such a request. By letter dated 4 September 2008, the defendant sought to extend the charter hire - see p. 104 of bundle A, a letter written by DW1 to the plaintiff:

> Re: CHARTER HIRE FOR MMS GAGAH AND MMS PANGLIMA
>
> Above matter refers.
>
> 2. We would like to continue our charter hire of above vessels for another 1 month in order to complete our tasks.
>
> 3. For your information, the method of payment for these services is by Deeds of Assignment.
>
> We are looking forward to positive action from your end.

[53] The plaintiff agreed subject to the defendant making an advance payment (see p. 105 of bundle A):

> WRECK REMOVAL OF MV 'RICO' BY MMS GAGAH:
>
> PAYMENT ON CHARTER DAYS
>
> Above matter refers.
>
> We thank you for the extension of charter. However, please remit payment on the outstanding days of charter for both MMS Gagah & MMS Panglima since their expiration dates. Kindly effect payment for upcoming charter days as well. Without this payment, we can't consider the extension request and deed of assignment.
>
> Your immediate attention on this matter is required.

[54] As can be seen from these letters, which are not in dispute, the extension sought by the defendant was initially for a longer period, one month. This was however, shortened to the present

five days and as notified by the plaintiff in its letter dated 5 September 2008 (see p. 106 of bundle A). The rates are as agreed and that is also evident from the terms of the charter party - see Boxes 10, 11, 19, 20, 21, 22 and 23 in the 2007 contract. For example, Box 10 provided that extension is optional and the period of extension is "to be mutually agreed" with two calendar days advance notice given. The maximum period of extension is seven days according to Box 11. The rate for the extension is as per Boxes 19 and 20; it is the same rate as the original contract rate of USD50,000 per day. Boxes 22 and 23 provided for the mode and place of payment for such extended hire; and that is "if there is any extension, subsequent extension of daily charter rate to be paid in advance based on agreed extension days".

[55] There is a final point that I must deal with and that concerns the invocation of the doctrine of *quantum meruit* to reasonably remunerate the plaintiff. The defendant contended that if the court holds the plaintiff had acted without fault in respect of the mobilisation of the MMS Gagah, with a justified and a reasonable period remaining on the site of the MV Rico, and the consequential demobilisation, the court can invoke this doctrine to award a quasi-contractual remedy - see *Foo Song Mee v. Ho Kiau Seng* [2011] SGCA 45 and *Loy Chin Assoc Pte Ltd v. Autohouse Trading Pte Ltd* [1991] 3 CLJ 1954; [1991] 4 CLJ (Rep) 973; [1991] 1 SLR(R) 740. This may be done where the plaintiff, as an innocent party to a legally formed contract, has rendered services but the recovery is limited to a reasonable sum on the basis of a restitutory *quantum meruit* or *quantum valebat*. There is no such plea in the statement of claim but the defendant is prepared to accommodate the plaintiff's application and invite the court to deal with the doctrine.

[56] At paras. 55 and 56 of its written submissions which were articulated orally, the defendant offered its calculations on what it perceived as the appropriate charges due to the plaintiff. It was the submission of the defendant that the plaintiff's claim ought to have been from the date of actual readiness to commence work, that is, 31 August 2008 to 3 September 2008, the date of completion of demobilisation at Pasir Gudang; a total of three days and 17 hours giving rise to a sum of USD285,416.66 (at the rate of USD50,000 per day). This is equivalent to RM973,416.64. Since the defendant had paid the plaintiff the full sum of

RM1,529,100, the defendant ought to be paid the difference between the two sums; which is the sum of RM555,683.36. In reply, the plaintiff declined to amend its claim to include this alternative plea of *quantum meruit*.

[57] Having made my findings on the plea of frustration, I do not find any need to consider this point. In any case, with the plaintiff declining to make any amendments to its claim, this issue does not arise.

[58] Accordingly, the plaintiff's claim is proved and it is therefore allowed; and, the defendant's counterclaim is dismissed. I shall make a single order for costs, namely a sum of RM50,000 as appropriate having regard *inter alia* to all the issues raised by both counsel; its complexity, the length of trial and the number of witnesses called.